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IS A CONTRACT NECESSARY TO CREATE AN EFFECTIVE ESCROW?

WHERE land has been sold and both parties are desirous of protecting themselves pending full payment of the purchase price, there are two common ways of accomplishing their purpose without any change in legal ownership. There may be (1) a contract of sale properly evidenced so as to be enforceable, and (2) a deed executed by the vendor and placed "in escrow."* Sometimes one method is preferred, sometimes the other.¹ If the former is adopted, it is, of course, vitally important that the contract comply with the formal requirements of the law; in the latter there has been some difference of opinion as to the necessity for such contract. Quite a number of courts and text writers in this country have held or said that a binding, effective escrow necessitates a contract pursuant to which the instrument is deposited.² A few courts have held that not only must there be a con-

* This expression which is commonly used in cases and books will be used in this paper. It is realized of course that a deed is not deposited in escrow, that what really happens is that an instrument in writing is deposited with a custodian as an escrow.

¹ It may be stated here that whichever method is adopted, the rights of the parties as against intervening third parties claiming through or under the vendor are the same. If the parties have adopted the contract method, questions of priority, etc., would be worked out by application of the familiar equitable principles; if, on the other hand, a deed has been made and placed in escrow, such questions would be solved in the terms of relation back. "To some purposes" says Sheppard's Touchstone, p. 59, "it hath relation to the time of the first delivery and to some purposes not." This illuminating statement affords as much assistance as does another familiar saying that there will be relation back "when justice demands it", otherwise not. See "Conditional Deliveries of Deeds of Land" by Professor Harry A. Bigelow, 26 Harv. L. Rev. 565, and "Conditional Delivery of Deeds" by Professor Herbert T. Tiffany, 14 Col. L. Rev. 389. In general, as to the position of the intervening third party I agree with the results arrived at by Professor Bigelow. I cannot, however, agree with his reasoning in arriving at such results. As pointed out in this paper the operation of an escrow in its effect upon ownership cannot be considered as a "legal short cut" for specific performance.

² See the cases referred to *infra*.

tract but it must be enforceable. It is the purpose of this paper to examine into the soundness of these doctrines.

First, as to the requirement that there be a legally enforceable contract. This doctrine seems to have been first expressed by the Wisconsin Supreme Court, in 1877, in *Campbell v. Thomas*.³ In that case there had been a parol contract of sale of certain lands pursuant to which the vendee had paid a small sum to apply on the purchase price and the vendor had deposited a deed with a third party with instructions to deliver same to the vendee, the grantee therein, upon making deposit of notes and mortgage and payment of a further sum in cash. The grantee having performed according to the agreement, and the grantor having directed the depositary to refuse to hand over the deed, suit was brought against the grantor and custodian to compel the delivery of the deed. It was held, reversing the trial court, that as there was no contract satisfying the statute of frauds there was, consequently, no effective escrow, the deed being subject to the grantor's control, and no action could be based on the contract. In support of the first proposition, that without a valid contract antecedent to the deposit of the instrument the deed was within the grantor's control, the court cited only *Fitch v. Bunch*,⁴ which will be referred to later. A rehearing was granted and further opinions rendered. MR. JUSTICE LYON said:

"Because such deposit did not divest the plaintiff of his title to the land, there is no executed contract of sale; and hence, it seems almost too plain to be questioned or doubted that, before the plaintiff can obtain the delivery of the deed and the title to the land, after the defendant has recalled the deed and repudiated the whole transaction, he must show that the defendant has made a valid and binding agreement to sell and convey the land. And such an agreement can be evidenced only by a written note or memorandum thereof, expressing the consideration and subscribed by the defendant. * * * But we have not discovered a single case in which it has been held that one who has deposited a deed of land with a third person with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depositary and recall the deed at any time before the conditions of the deposit have been

³ 42 Wis. 437, 24 Am. Rep. 427.

⁴ 30 Cal. 208 (1866).

complied with; provided that those conditions are such that the title does not pass at once to the grantee upon the delivery of the deed to the depository."

And RYAN, C. J., said:

"I have no doubt that an *escrow* may be proved by parol. The difficulty here is not in the proof of the alleged *escrow*, but in the proof of the contract of sale and purchase itself. When there is a valid contract under the statute, the papers constituting it, or executed in compliance with it, may be delivered in *escrow*, and the *escrow* may be proved by parol. But the validity of the *escrow* rests on the validity of the contract; and the validity of the contract rests on the statute."⁵

The doctrine of *Campbell v. Thomas* was expressly approved and followed by the Supreme Court of Indiana in 1881 in *Freeland v. Charnley*.⁶ The court there held that an escrow is a mere paper with characters thereon until *delivered* to the grantee upon or after the performance of the conditions,⁷ and in the absence of an enforceable contract of sale may be withdrawn by the grantor at any time before performance. The court said:

"It is clear to our mind that a deed placed in the hands of a depository, with instructions to deliver it upon the performance of a designated condition by the grantee, may be recalled before performance. Until the grantee has in some manner assented to such deposit, there cannot be the semblance of a delivery, for every delivery implies an acceptance. Of course, if there is, back of the deposit of the deed, an enforceable contract, relief might be had; but in such a case the deposit of the deed would not supply the right of

⁵ It is more than merely interesting to observe that Wisconsin is one of those states in which an oral contract for the sale of land is not only unenforceable under the familiar statute providing that "no action shall be brought, etc.," but it is positively declared by the statute (Wis. Stat. 1898, c. 104) to be *void*. In *Campbell v. Thomas*, then, there not only was no enforceable contract but there was no contract at all. This distinction may be of no little importance. As will appear later on, where there is no contract at all between the grantor and grantee it is much easier for a court to hold that the grantor has not completely yielded up control of the instrument than where there is a contract even though it be unenforceable. That in Wisconsin such oral contract is really *void*, see *Koch v. Williams*, 82 Wis. 186 (1892). A very nice instance of a contract unenforceable by action but effective for another purpose is the very late case in the House of Lords of *Morris v. Baron & Co.*, (Oct. 19, 1917), 87 L. J. R. (K. B.) 145.

⁶ 80 Ind. 132 (1881).

⁷ The Indiana court placed great reliance upon the old-fashioned notion that the deed is inoperative as a conveyance until actually delivered by the custodian to the grantee. How much influence this requirement of a formal delivery to the grantee had upon the court in arriving at its conclusion is, of course, impossible to say. See *infra*, note 33.

action—that would be supplied by the executory contract. In the case at bar the deed was recalled before the performance of the condition, and there was no enforceable executory contract. Without such a contract there is no cause of action.”⁸

In *Main v. Pratt*⁹ the Wisconsin doctrine was adopted in Illinois, it being there held that since the contract of sale was oral the deed deposited in *escrow* pursuant thereto was rendered wholly ineffective by the grantor's death. The court said (p. 224) :

“The delivery of the deed by Mrs. Finn and of the note by Pratt to Hoss was in pursuance of and a part of a parol contract between the parties for the sale by the grantor to the grantee of the land. Whether or not they lost control over the respective instruments deposited with Hoss depends upon the validity or enforceability of the contract and not solely upon the intention of the parties, as contended by appellant. The parol contract for the sale of the land clearly came within the operation of the Statute of Frauds and was unenforceable. Neither party could have compelled the other to carry out its provisions or terms during the lifetime of Mrs. Finn, and it follows, such being the case, either party could have repudiated the contract at will before the conditions upon which it was to be delivered to the grantee had been performed. This being so, the contract, whether revoked by the death of Mrs. Finn or not, was no more binding upon and enforceable against her sole heir than it was against Mrs. Finn in her lifetime.”

The court cited only *Campbell v. Thomas* and *Kopp v. Reiter*¹⁰ wherein the *Campbell* case had been referred to approvingly.

During 1917 the Oregon court, in *Foulkes v. Sengstacken*,¹¹ and the Washington Court, in *McLain v. Healy*,¹² decided that a binding deposit in *escrow* necessitated an enforceable contract pursuant to which the deposit is made. In the Oregon case the court points out that without such contract there was only a continuing offer which necessarily terminated with the death of the offerer. Both

⁸ In *McCasland v. The Aetna Life Ins. Co.*, 108 Ind. 130 (1886), the court said that “Where a promise is so far executed that a deed is delivered under it conditionally, it is taken out of the statute of frauds when the condition is fully performed, for, upon the performance of the condition, the deed becomes effective and the grantee is entitled to it.”

⁹ 276 Ill. 218 (1916).

¹⁰ 146 Ill. 437 (1893).

¹¹ 83 Ore. 118.

¹² 168 Pac. 1.

cases rest directly or indirectly upon the authority of *Campbell v. Thomas* and a group of cases, of which *Fitch v. Bunch, supra*, is a prominent example, to be referred to presently.

These five jurisdictions, it is believed, are the only ones in which there have been definite, authoritative rulings that such an enforceable contract back of the *escrow* is essential to make the deposit irrevocable by the maker thereof.¹³ It is certainly interesting and perhaps significant that the first one of these decisions was handed down by a court in Wisconsin no longer ago than 1877, and that the other cases rest directly or indirectly upon that adjudication.

Not infrequently courts¹⁴ and writers¹⁵ have cited in connection with *Campbell v. Thomas*, apparently as rulings to the same effect, another group of cases. *Fitch v. Bunch, supra*, is not only typical of this class but has been quite largely relied upon by the cases making up the group. In that case B and plaintiff's husband agreed to exchange lands of plaintiff for some mining stock owned by B. Plaintiff, with her husband, made out a deed of the land and deposited it with N with whom the stock was also left. The arrangement was further that the husband and B should visit the mine, and then, if they were satisfied, orders were to be issued to N to deliver the stock and deed. After the inspection directions were given by the husband and B to N to deliver, but in the meantime plaintiff had notified N that he was not to deliver the deed but to return it to her. In an action by her to enjoin turning the deed over to B the court held the deed had never passed out of her control and therefore she could recall same. After pointing out that deliveries of deeds may be either absolute or conditional, the court said:

"Every act necessary to be performed by either party to the deed, in order that the present title may pass to the grantee, must also be performed, in case of an *escrow*, except only the delivery of the deed to the grantee. An *escrow* differs from a deed in one particular only, and that is the delivery. In all other requisites, they are the same. Not only must there be sufficient parties, a proper subject matter and a consideration, but the parties must have actually contracted. When the instrument purports to be a conveyance of land, the grantor must have sold, and the grantee must have

¹³ The same doctrine is laid down in *Seifert v. Lanz*, (N. D.) 150 N. W. 568 (1915). The court, however, found that there was an enforceable contract.

¹⁴ See *Nichols v. Oppermann*, 6 Wash. 618 (1893); *Clark v. Campbell*, 23 Ut. 569 (1901); *Davis v. Brigham*, 56 Ore. 41 (1910); *Seifert v. Lanz*, (N. D.) 150 N. W. 568 (1915).

¹⁵ 11 Am. & Eng. Enc. Law (2nd ed.) 335; 10 Ruling Case Law 622.

purchased the land. A proposal to sell, or a proposal to buy, though stated in writing, will not be sufficient. The minds of the parties must have met, the terms have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered and the grantee received, except for the agreement then made that it be delivered to a third person, to be kept until some specified condition is performed by the grantee, and thereupon to be delivered to him by such third person. The actual contract of sale on the one side, and of purchase on the other, is an essential to constitute the instrument in *escrow*, as that it be executed by the grantor; and until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form of deed, is neither a deed nor an *escrow*; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third person, pending the proposals for sale or purchase."

As a further reason for the decision it was pointed out that the instrument could not be said to have been delivered, in the sense in which that term is used in defining an *escrow*, for it was to be held subject to the order of the depositor; there were to be additional directions before the deed should become operative.

This case, it is submitted, falls far short of a decision that an effective deposit in *escrow* necessitates an *enforceable* contract. In the first place, it is clear on the facts that there could not have been an effective delivery, for something remained for the grantor to do before the custodian would be authorized to make delivery, hence there had been no complete yielding up of control which is so essential to a good delivery. Secondly, the court, in talking about a contract, quite evidently was not considering this as essential *so that an action might be brought thereon*, but to establish that no further negotiations were contemplated; that all that remained to make the instrument an operative deed was the performance of the condition; that, in short, the maker had no further right to control the disposition of the instrument.

The view of the California court as to this situation is further shown by the decision in *Cannon v. Handley*.¹⁸ There an instrument was deposited "in *escrow*" pursuant to an oral contract of sale. Later and before the condition was performed by the vendee, the vendor sought to call off the transaction and withdraw the deed. The

¹⁸ 72 Cal. 133 (1887).

vendee, however, went on and tendered performance. The court held he was entitled to the premises, and ordered a deed thereof to be made by the grantee to whom the vendor had conveyed.¹⁷ *Fitch v. Bunch* was followed by the same court in *Miller v. Sears*¹⁸ and *Holland v. McCarthy*,¹⁹ in neither of which had there been any contract oral or written, the court again emphasized the fact that the depositor still had a right to control the instrument.

The *Fitch* case was one of the few cases cited by the Wisconsin court in *Campbell v. Thomas* as supporting the doctrine there announced, that an enforceable contract is a necessity for a binding deposit in escrow. The other cases cited merely laid down the familiar principle that there can be no delivery so long as the depositor may revoke or recall the instrument. *Fitch v. Bunch* really

¹⁷ The court considered that in this case there was a contract "certain in all its parts, partly executed and performed by delivery of the property sold, and a deed perfect in every respect executed by the grantors to the vendee, and placed in the hands of defendant Cox, to be delivered by Cox to plaintiff on the payment of the purchase money. * * * The deed was delivered as an escrow to Cox, and he so held it. * * *

"We cannot concur in the view that Cox was the mere agent of the vendors, and held the paper as such, being bound to deliver the paper to the vendors when demanded of him by them. He was to hold it, and deliver it to the vendee when the money was paid; * * * The question is so clear that further discussion would darken instead of elucidating it.

"The deed being then delivered as an escrow, it is no longer *revocable by the vendor*, but it will take effect whenever the condition has happened or been complied with on which it is to be delivered.* * * From this it would clearly follow that the grantor cannot recall the deed after the delivery as an escrow; and when the condition is complied with by the grantee, he is absolutely entitled to it. The Ohio Supreme Court in the case of *Shirley v. Ayres*, above cited (14 Oh. 308), held that, inasmuch as the depository of the escrow was the agent of the grantee as well as grantor, the deed takes effect the moment the condition is performed, without any formal delivery into the hands of the grantee. In other words, it may be said, when the condition is performed, the depository becomes the custodian of the grantee, holding the deed for him, and this possession as such custodian is the possession of the grantee. We think this rule is based on sound principles, and should be upheld."

Later on in its opinion the court opens itself to question in disposing of a contention by the defendant that no relief should be granted for the reason that the contract was oral. The court, following *Cagger v. Lansing*, 57 Barb. 421, held the deed a sufficient note or memorandum to satisfy the statute of frauds.

If a deed delivered to a custodian pursuant to an oral agreement of sale is, as said by the Indiana court in *Freeland v. Charnley*, supra, "no more than a mere piece of paper covered with written or printed characters and possesses no more force than a poem or an historical essay, locked in the desk of the person described as grantor," then surely the court went too far. The court, however, had already declared, as quoted above, that a deed delivered as an escrow is something decidedly more than a mere piece of paper, etc.; it is, as to the grantor, a completed legal act, and beyond his control. See also to same effect, *Tharaldson v. Everts*, 87 Minn. 168 (1902).

¹⁸ 91 Cal. 282 (1891). Here the question of title remained to be settled to the satisfaction of the contracting parties. "This fact alone is fatal to the contention of respondents that they held the documents in controversy as an escrow." The court then cites and quotes from *Fitch v. Bunch*.

¹⁹ 173 Cal. 597 (1916). In this case *Cannon v. Handley* is distinguished on the ground that here there was no contract at all.

goes no further.²⁰ The Utah court in *Clark v. Campbell*,²¹ a case in which palpably the maker of an instrument had not divested himself of control, repeats the requirements of an effective escrow announced in *Fitch v. Bunch*. The language of the court, however, is taken from *DEVLIN ON DEEDS*²² which in turn took it from the case last referred to. The same doctrine in virtually the same language taken from the same source is found also in the *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW*²³ and in *RULING CASE LAW*.²⁴ The latter is the only "authority" aside from *Campbell v. Thomas*, relied on in the very recent Washington case, *McLain v. Healy*, above referred to as requiring an enforceable contract.

In addition to the cases already referred to the following have been occasionally cited as to the same effect as *Campbell v. Thomas*; *Patterson v. Underwood*²⁵; *Wier v. Batdorf*²⁶; *Hoig v. Adrian College*²⁷; *Stanton v. Miner*²⁸; *Bosea v. Lent*²⁹; *Anderson v. Messenger*³⁰. For the proposition that a binding deposit in escrow necessitates a yielding up of all control of the instrument pending the performance of the conditions these cases may well be cited. But they cannot be considered as rulings that an *enforceable* contract between the parties is the only means by which such control may be lost³¹.

²⁰ Obviously one of the best ways of showing that the parties had left nothing to further negotiation, that the deal was closed, in other words, that there was nothing left for the grantor to do which could be said to keep the deed within his control, is by proving a contract. Whether that is the *only* way in which complete divestiture of control may be shown is questionable. Perhaps the error in the California court's doctrine, if it may be called that, is in speaking of the most common method of establishing lack of control as the only method.

²¹ 23 Ut. 569 (1901).

²² Vol. 1, Sec. 313.

²³ Vol. 11, p. 335 (2nd ed.).

²⁴ Vol. 10, p. 622.

²⁵ 29 Ind. 607 (1868).

²⁶ 24 Neb. 83 (1888).

²⁷ 83 Ill. 267 (1876).

²⁸ 58 N. Y. 192 (1874).

²⁹ 44 Misc. Rep. (N. Y.) 437 (1903).

³⁰ 158 Fed. 250 (1907).

³¹ In *Patterson v. Underwood* the owner of land had made out a deed thereof and put it into the hands of one who had contracted to convey the premises to the grantee named in the deed. The custodian having torn up the deed before his vendee had performed, it was held that the latter's remedy against the former was wholly based upon his contract which was unenforceable by reason of the statute of frauds.

In *Wier v. Batdorf*, it was simply held that inasmuch as the deed had been left with the grantor's own agents who had no authority to receive the grantee's money or deliver the deed there was no escrow.

Hoig v. Adrian College is referred to at length *infra*, p. 579.

Stanton v. Miller arose upon an action by the grantee in a deed to compel a custodian with whom the instrument had been left and the heir of the grantor to deliver same to plaintiff. The deed had been left with the depositary with the express understanding that it might be recalled at any time. This was the real ground for the decision refusing the

In the discussion of the main problem it may be helpful to consider these situations:

I. A contracts to sell and convey land to B in consideration of \$5,000. Pursuant to the agreement A makes out a deed and leaves it with X with instructions to deliver to B when B shall have turned over to X the purchase price. The contract is evidenced by writings and is enforceable.

II. A makes out a deed to B and deposits it with X with instructions that in case B leaves \$5,000 with X he shall deliver the instrument to B. There were no prior negotiations between A and B, or if there were, no agreement had been reached.

III. Same as CASE I, except that the contract between A and B is oral, hence unenforceable under the Statute of Frauds.

Let us suppose in each case that before B performs the condition A notified X that the deal is off and requests the return of the deed; that B nevertheless performs or tenders performance; and that B through litigation seeks to enforce his claim to the land. Such litigation might take the shape of an action to compel the execution of a deed pursuant to an alleged contract, an action to compel the turning over of the deed as a muniment of B's title, or perhaps under some circumstances, a bill to quiet title.

relief prayed for. The court, however, said: "The making of a deed *in escrow* presupposes a contract, pursuant to which the deposit is made; it implies an arrangement between the grantor and the party who is to perform the condition; and where the one has agreed to convey when the condition is performed, and the other to perform the condition, and the deed has been placed *in escrow*, to carry out the purpose as defined in the contract or arrangement between the parties, without any reservation, express or implied, on the part of the grantor, when the deposit is made, of a right to recall the deed, then the authorities are that the delivery cannot be revoked by the party making it, so long as there is no breach by the other of the condition upon which it is made." Here there is absolutely nothing said about an *enforceable* contract; in fact it is far from clear that the court, even in this *dictum*, insists upon any contract, for they say, "Contract or arrangement". Is it not clear that what the court had in mind was simply the familiar proposition that nothing must remain to be done by the grantor, that the deed must have passed beyond his control? The authorities cited by the court in this connection bear out this view, they all stand for the doctrine that when a deed is deposited with a third party, in order to amount to a delivery the grantor must have finished up his part of the transaction and reserved no right to recall the deed or to control its course.

So in *Bosea v. Lent*, an inferior New York court merely repeated the doctrine of *Stanton v. Miller*, above cited, in a case where it was concluded that the custodian was acting merely as the agent of the grantor.

And in *Anderson v. Messenger* the situation was the same, the court considering that the deeds were left with the custodian not as escrows but so that they would be convenient to get. The court says, to be sure, that "to constitute an escrow there must be a contract, which prevents the grantor from recalling the deed". As authorities for this requirement the court cites *James v. Vanderheyden*, 1 Paige (N. Y.) 385; *Cook v. Brown*, 34 N. H. 460; *Prutsman v. Baker*, 30 Wis. 644, all of which are familiar cases supporting the propositions that in order to have a delivery there must be a complete divestiture of control over the instrument, or that nothing must remain to be done by the grantor in order to make the instrument operative.

The same problem in essence is presented briefly by the inquiry: Is A in position to demand and compel X to return the deed? This was the way the question got before the court in *Fitch v. Bunch*.

Clearly in CASE I it would be held that B should prevail, or, in other words, that A could not insist upon the return of the deed by X. All courts apparently would agree as to this situation. At the moment performance by B is complete he becomes the legal owner, and it would be immaterial that the deed remained, perhaps, in the possession of X. There is some difference of opinion as to this,³² but the sound view undoubtedly is to the effect that no manual delivery from X to B is necessary.³³ To the demand of A for the return of the deed it would seem entirely sufficient for X to reply, "This instrument deposited with me by you was not left in any sense subject to your order; upon his performance of the conditions specified B, as I understand it, is to have this paper as your deed, and only in case of his failure to comply with the terms of the arrangement between you, am I to be considered as holding it subject to your order."³⁴

In CASE II it of course is obvious that B could not succeed on any claim for specific performance, and it is unlikely that he could succeed in any other form of action. Also it would seem that A would be entitled to demand the return of the deed by X. A reply as indicated above would hardly be sufficient under the facts of CASE II. The essence of the transaction here would seem to be a mere offer by A to B, revocable at any time by A, and the holding by X therefore would be as an agent of A.

In *Holland v. McCarthy*³⁵ the California court put it as follows: "Here no right to revoke or recall was expressed as a condition at the time the deed was handed to Julia McCar-

³² See, for instance, *Freeland v. Charnley*, *supra*.

³³ "Some courts hold that an escrow does not take effect as a fully executed deed until there has been a rightful delivery to the grantee; but the logical position approved in a number of authorities is that it is effective as a deed when the grantor relinquishes the possession and control of it by delivery to the depository, and it passes the title to the grantee when the condition is fully performed, without the necessity of a second delivery by the depository." *Craddock v. Barnes*, 142 N. C. 89, 96. In the same case the court further said: "When the condition is complied with, the depository holds the deed for the grantee, the same as if it had been originally delivered to him as the latter's agent, in which case the grantee would of course get the title, and could by proper action compel an actual delivery by the depository." 'Citing *Steamboat Co. v. Moragne*, 91 Ala. 610; 11 Am. & Eng. Enc. Law (2 ed.), p. 345; *State Bank v. Evans*, 15 N. J. L. 155; *Hughes v. Thistlewood*, 40 Kan. 232; 16 Cyc. 588; *Baum's Appeal*, 113 Pa. St. 58.

In support of the proposition of *Craddock v. Barnes*, that no formal delivery to the grantee is necessary, many cases might be cited. The following will suffice: *Tombler v. Sumpter*, 97 Ark. 480; *Shirley v. Ayres*, 14 Ohio 307; *Naylor v. Stene*, 96 Minn. 57; *Davis v. Clark*, 58 Kans. 100; *Grove v. Jennings*, 46 Kans. 366.

³⁴ *Cf. Doe d. Garnons v. Knight*, 5 B. & C. 671, 688.

thy. But, as no part of the consideration was paid, this was not necessary. Mary A. Holland had the right to recall the deed at any time before the grantees paid the money specified. Until that event, Julia McCarthy was nothing more than a voluntary agent of the grantor to hold the deed subject to her order. Only upon the payment of the price or some part thereof would the grantees have a beneficial interest sufficient to make delivery irrevocable. Prior to such payment the delivery was nothing but an offer or proposal which the grantor had the legal right to withdraw. Her death terminated and revoked the offer and the authority of Julia McCarthy as her agent subsequently to accept the money and deliver the deed."³⁶

To hold otherwise would be to reach the rather unusual result of a mere proposal being turned into an irrevocable offer by placing a paper in the hands of a third party.

Somewhat closely related to CASE II and yet quite different in the essence of the situation are cases of the type of *Hoig v. Adrian College*.. There, to carry out a gift, a deed of land was prepared by the owner and placed in the custody of a third party to be delivered to the grantee on the deed being signed by the grantor's wife and a mortgage prepared and executed by the grantee. The grantor died before these conditions were performed. At the suit of the heirs of the grantor to have the deed set aside the court held there had never been a delivery. The deed was never out of the control of the grantor, the court considering that the mortgage was to be executed to his satisfaction. Further orders, then, were needed before the custodian was to be authorized to turn over to or hold the deed for the donee. The court said:

"Being a voluntary conveyance, without consideration, the grantor was at liberty at any time to withdraw the deed from the possession of the custodian, and the grantee could have no just cause to complain. The grantor was under no legal obligation to complete the donation. * * *

"It is not sufficient he may have agreed to deliver the deed, to perfect the donation. On refusal a court of equity would not compel a specific performance. Until it was actually delivered to the donee, the *locus poenitentiae* existed, no matter in whose hands the deed was. Whatever authority the custodian may have had, it ceased with the death of the donor. No delivery could rightfully be made after his death."

³⁶ Supra, p. 576.

This is one of the cases, it should be noted, which, as stated above, have been frequently referred to as authority for the doctrine that a contract is essential for a binding escrow.

That the *Hoig case* was correctly decided there can be no doubt, for something remained to be done by the grantor. If that element were out of the case, there might be room for a difference of opinion. Such situation will be referred to later on.

As to CASE III. Under the doctrine of the courts above referred to following *Campbell v. Thomas* the answer is clear to the effect that B cannot prevail. A could require X at any time, at least before performance has begun, to return the instrument, and the death of A would revoke any authority that X might otherwise have to make delivery. According to these cases the situation presented in CASE III is essentially the same as in CASE II, and the relationship between A and X is that of principal and agent. If, as to the deed, that is really the relationship, then those decisions are unassailable. If, on the other hand, the deed is deemed, as in CASE I, to have passed beyond the control of A, then it is equally clear that those cases are wrong. The question fundamentally, it is submitted, is not the enforcement of a contract specifically or otherwise, but is one of *delivery*, and that very largely depends upon the matter of intent.

Delivery is the required manifestation of intention that the transaction, as to the one making the delivery, is a completed legal act.³⁷ Conceivably the law might have been satisfied with the signing or the sealing as evidencing a completed legal act. As to the sort of instruments under consideration, however, the law did not stop with such acts, that additional something called *delivery* was required. What will amount to such a sufficient manifestation of intention is an extremely difficult question at times, and no adequate discussion of that general problem can be attempted here. It will suffice to say in the oft-quoted language of the TOUCHSTONE³⁸ "that delivery is either actual, i. e. by doing something and saying nothing, or else verbal, i. e. by saying something and doing nothing, or it may be by both."

Deliveries may be either absolute or conditional. In the former the deed or other instrument is operative presently; in the latter its operation is postponed until the performance of some condition or

³⁶ See also *Seifert v. Lanz*, *supra* (150 N. W. 568, 570).

³⁷ See Wigmore on Evidence, section 2404 *et seq.*

³⁸ At p. 57.

perhaps the happening of some event.³⁹ But the vital element in any delivery, absolute or conditional, is that the maker of the instrument somehow sufficiently evince his intention that the instrument *as to him* is a completed legal act, that there is nothing left for *him* to do. In the case of absolute delivery such intention is shown normally by a manual transfer of the instrument from the maker to the one to take thereunder or to someone on his behalf. Such manual transfer, however, is by *no* means absolutely essential. As to conditional deliveries, the most common form of which is usually referred to as delivery in escrow THE TOUCHSTONE says:

“And so also a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him: or it may be delivered to any stranger for, and in the behalf, and to the use of, him to whom it is made. without authority. But if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery. * * *

“The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made.”⁴⁰

More and more courts are coming to determine this matter of intention in terms of control “over the deed” or other instrument. In the leading case of *Doe d. Garnons v. Knight*,⁴¹ where the question was whether a deed of Wynne to Garnons left in the hands of Wynne’s sister had been delivered the court said that if the handing of the deed to the sister was a departing “of the power and control over the deed for the benefit of Mr. Garnons” the delivery would be good; “but if it was delivered to the sister for safe cus-

³⁹ Some authorities take the position that if a deed is delivered to a third party to be delivered to the grantee on the happening of an event which is certain to happen sometime, as the death of the grantor, the deed is fully operative as a conveyance to the grantee at once. See *infra*.

⁴⁰ Fp. 57, 58.

⁴¹ 5 B. & C. 671 (1826).

tody only for Mr. Wynne, and to be subject to his future control and disposition, it was not a good delivery." In *Prutsman v. Baker*⁴² the court said:

"To constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this he must part with the possession of the deed and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself, or to some person for him, which is called an absolute delivery; or otherwise he must part with all present or temporary right of possession and control until the happening of some future event or the performance of some future condition, upon the happening or not happening, or performance or non-performance of which, his right of possession may return and his dominion and power over the deed be restored; in which case the delivery is said to be contingent or conditional. An essential, characteristic, and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power and control over the deed by the grantor for the benefit of the grantee, at the time of the delivery. *Porter v. Woodhouse*, 59 Conn. 568; *Baker v. Haskell*, 47 N. H. 479."

Many other cases might be referred to in which delivery was determined by consideration of the question as to whether the grantor had parted with all control.⁴³ Difficulty may well arise in this connection by confusing physical power or control with legal right or privilege over the disposition of the instrument, or, in other words, with legal power over the operation thereof. One may very well have the fullest physical power or control over a deed and yet have absolutely no legal right or privilege to deal therewith, except for the benefit of the grantee.

In a case such as the one under consideration the temptation is to say simply that A, the grantor, could call off the transaction and recall the deed before performance on the other side because the deed had not been delivered and therefore had not passed beyond his control. In other words, the deed is not out of the grantor's control because not delivered, and it is not delivered because still subject to directions of the grantor. It would, of course, be equally convincing to say that the grantor may not revoke the

⁴² 30 Wis 644.

⁴³ *Johnson v. Johnson*, 24 R. I. 571; *Bury v. Young*, 98 Cal. 446; *Moore v. Trott*, 156 Cal. 353; *Munro v. Bowles*, 187 Ill 346; *Burk v. Sproat*, 96 Mich. 404; *Williams v. Schatz*, 42 Ch. St. 47. These are only a few of the many cases.

transaction and recover the deed because there has been a delivery because in turn the deed has passed out of his power.

When a deed is made out and left with a third party to be delivered sometime in the future to the grantee, control thereof may be retained by the grantor by virtue of the terms of the arrangement between him and the custodian. This is true even though such arrangement is contrary to the terms of a contract between grantor and grantee.⁴⁴ So we may at once dismiss those cases where there is such a provision in the instructions to the custodian. In such cases obviously there can be no binding escrow, and after recall of the deed the grantee would be without remedy unless he has an enforceable contract upon which to base an action.

The right to recall and control the deed may exist, however, even in situations where there has been no such express provision. If the relationship between depositor and depository *as to the holding and handling of the deed* can fairly be said, in view of all the circumstances, to amount to that of principal and agent, then clearly there is a right of control left in the maker of the instrument. It is believed that in situations such as suggested above as CASE II it is not at all unreasonable to construe the relationship between A and X as that of principal and agent. There something remained to be done, and, as pointed out by the California court in *Holland v. McCarthy*,⁴⁵ the transaction on the part of A amounted only to an offer, and X was only an agent of A to carry out the deal if the offer should be accepted.

In CASE I where the deposit was made pursuant to an enforceable contract between A and B it is agreed that A had no control left. It is submitted that the reason why he had no such control left was not because he was *bound* by a contract but because he had left the deed with X *for B* and there was nothing in the circumstances to cause X to be looked upon as an agent of A. He expressed his intent that upon the performance of a condition the deed should be operative.

Is there any more reason for considering X the agent of A in CASE III where there is a contract but it is unenforceable by action? No control was reserved by the terms of the deposit, so A's ability to determine the course of the deed, if he has any, must depend upon the relationship between him and X. Here the parties' minds had met, the deal was closed, and there was a contract, pursuant to which the deposit with X was made. Is there any sound

⁴⁴ This was the situation in *Stanton v. Miller*, *supra*.

⁴⁵ *Supra*.

basis for saying that X held *for A*, or subject to his orders simply because here A could break his contract with B without suffering quite the same penalties for so doing as in CASE I? Has a party any more "right to break" a contract unenforceable by reason of the Statute of Frauds than he has to break one that complies with the Statute?⁴⁶

It would seem clear, then, that in a case where the deed is deposited pursuant to a contract unenforceable though it may be, there has been the requisite yielding up of control to constitute delivery. There being a delivery, a completed legal act, so far as the grantor is concerned, has been accomplished, and as to him there can be no longer any question of enforceability of a contract or of the Statute of Frauds. It is believed that the court in *Campbell v. Thomas* and the other courts following the doctrine there laid down have wholly failed to appreciate the nature of the problem involved, and the operation of conditional delivery. Those cases, it is submitted, were incorrectly decided.⁴⁷

After the grantor has sufficiently manifested his intention that the deed is as to him a completed legal act the result would seem to be, in the language of Professor Hohfeld, that "the grantee has an irrevocable power to divest that title (in the grantor) by performance of certain conditions * * *, and consequently to vest title in himself, while such power is outstanding, the grantor is, of course, subject to a correlative liability to have his title divested."⁴⁸

⁴⁶ This of course would be inapplicable where the oral contract is not merely unenforceable but void. And it must not be forgotten that *Campbell v. Thomas*, the basis of the requirement that there be an enforceable contract, was decided in a state where the statute of frauds declares oral contracts for the sale of land void. Judge Lyon in that case spoke of the oral contract as a "nullity". See note 5, *supra*.

⁴⁷ It may very well be true that lack of control over a deed deposited with a third party to take effect on the performance of a condition may be shown very satisfactorily by proving that such deposit was made pursuant to an enforceable contract with the grantee; but that it is the only way of showing such yielding up of control, as laid down in *Campbell v. Thomas* is, it is submitted, wholly erroneous.

In *Farley v. Palmer*, 20 Oh. St. 223, although the case might well have been disposed of on another ground, there is a very nice instance of the working out of the correct doctrine. Palmer and wife had contracted to sell and convey her land to Farley, and a deed signed, etc. by Palmer and wife had been executed and deposited in escrow to await the payment of the purchase price. Upon refusal by Farley to perform, Palmer and wife sued Farley to compel him to pay the price. He defended on the ground that since Mrs. Palmer as a married woman was not bound by the contract he could not be compelled to perform. The court, however, rejected this contention, holding that Mrs. Palmer *had already performed*, by the deposit in escrow, that she had no power to revoke the deed, and that upon performance by Farley the title would have vested in him *ipso facto* without further delivery. See also *Davis v. Clark*, 58 Kans. 100 (1897); *Grove v. Jennings*, 46 Kans. 66 (1891).

⁴⁸ Fundamental Legal Conceptions, 23 Yale L. Jour. 16, 48. This view of the situation is very helpful in working out the position of intervening third parties.

Other reasons for disapproving of the rule of *Campbell v. Thomas* have been expressed. Professor Tiffany has had the following to say:

"The view referred to (that expressed in *Campbell v. Thomas*) has no considerations of policy or convenience in its favor, and its necessary result is considerably to detract from the practical utility of the doctrine of conditional delivery. One objection to such a view would seem to lie in the fact that the doctrine of conditional delivery is ont peculiar to conveyances of land, but is recognized also in connection with contracts under seal⁴⁹ and also bills and notes. If there can be no conditional delivery of a conveyance in the absence of a contract of sale, that is, a contract to execute a conveyance, it would seem a reasonable inference that there can be no conditional delivery of a contract under seal or a promissory note unless there is a contract to execute such an instrument. There is no more reason for requiring an auxiliary contract in the one case than in the others. Yet it has never been suggested, so far as the writer knows, that there can be a conditional delivery of a contract under seal or a promissory note only when there is a legally valid contract to execute the contract or note. Another consideration adverse to the view referred to lies in the fact that, while the doctrine of delivery in escrow was recognized at least as early as the first half of the fifteenth century (see Y. B. 13 HEN. IV, 8; Y. B. 8 HEN. VI, 26; Y. B. 10 HEN. VI, 25), a purely executory contract, not under seal, was not then enforceable either in the common law courts, or, it appears, in chancery. That being the case, the requirements of an extraneous contract in order to make the delivery in escrow effective would, in the fifteenth or sixteenth centuries, have necessitated a contract under seal, and it seems hardly probable that such a delivery of an obligation or conveyance under seal was always accompanied by another obligation under seal calling for its execution. The subject of delivery in escrow is treated with considerable fullness in at least two of the earlier books (PERKINS, CONVEYANCING, Sec. 138-144; SHEPPARD'S THE TOUCHSTONE, 58, 59), and there

⁴⁹ See *Naylor v. Stene*, 96 Minn. 57 (1905), where the instrument deposited in escrow was itself a contract of sale of land. Before performance of the condition the vendor notified the custodian that the contract should not be given to the vendee. The court held, however, that immediately upon performance of the condition the contract became binding. Cf. *King v. Upper*, 57 Wash. 13.

is not the slightest suggestion in either as to the necessity of such an auxiliary contract. It is, to say the least, somewhat extraordinary that an integral element in a doctrine dating from the commencement of the fifteenth century should have remained to be discovered by a California court⁵⁰ in the latter half of the nineteenth."⁵¹

In *Campbell v. Thomas* it was pointed out on behalf of the grantee that there are a great many cases in which courts have held deeds left with a third party to be delivered to the grantees therein upon the death of the grantor, or some other event certain to occur in the future, were beyond the control of the grantor. The court recognized such cases as sound, providing the deposit of the deed is made without any provision for recall or control, and distinguished them on the ground that there "the first delivery of the deed passes to the grantee the title to the land, and thus relieves him of the obligation to make title through any contract other than that expressed in the deed itself. If it is true that in such cases there is at once an absolute conveyance *in praesenti*, the distinction drawn is obviously sound. While many cases may be found in which it is said that the "first delivery" passes the title to the grantee,⁵² sometimes with the qualification or addition that a life estate somehow has been reserved to the grantor,⁵³ the most carefully considered cases are to the effect that the grantor is not divested of his ownership until the happening of the event specified.⁵⁴ In such cases the proper view would seem to be that there has been an inchoate delivery complete so far as the grantor is concerned, in other words a

⁵⁰ Professor Tiffany considers *Fitch v. Bunch* as the originator of the requirement that there be an enforceable contract. In this I think he is in error. That case did not go nearly so far either in its decision or language.

⁵¹ "Conditional Delivery of Deeds", 14 Col. L. Rev. 389, 399-400.

⁵² *Wheelwright v. Wheelwright*, 2 Mass 447; *Brown v. Westerfield*, 47 Neb. 399. See 26 Harv. L. Rev. 576-579.

⁵³ *Bury v. Young*, 98 Cal. 446; *Grilley v. Atkins*, 78 Conn. 380; *Meech v. Wilder*, 130 Mich. 29; *Arnegaard v. Arnegaard*, 7 N. D. 475; *Maxwell v. Harper*, 51 Wash. 351. How a life estate in the grantor can be created by a juggling of delivery is a question never adequately answered.

⁵⁴ In *Stone v. Duvall*, 77 Ill 475, where the grantee died before the grantor and the latter endeavored to have the deed cancelled, it was held that the deed, though beyond the grantor's power to recall, would not be operative as a conveyance until the death of the grantor, and that in the meantime the grantor was the owner and entitled to use the land *as though he had a life estate*. *Stonehill v. Hastings*, 202 N. Y. 115, is another clear ruling that until the happening of the event the grantor remains the owner.

Although the courts not infrequently say that in such cases as are now under consideration the deed when handed to the custodian is the grantor's deed "presently", probably nothing more is meant than that after such delivery the grantor cannot plead *non est factum*, a conclusion, even if sound, which falls far short of a holding that the deed is then fully operative as a conveyance investing the grantee with ownership. See *Foster v. Mansfield*, 3 Met. 412.

manifestation of intention that as to him the deed shall be taken as a completed legal act, the full operation of which as a conveyance, however, is to be postponed until the happening of the event, as in cases of true escrows the full operation of a deed completely executed by the grantor is postponed, in order to carry out the intention, until the condition is performed.⁵⁵

There is another type of case which perhaps should be referred to. Suppose A promises B to convey land to him as a gift at such time as B may perform some act or comply with a certain condition, and a deed is made by A and deposited with X with instructions to deliver to B on the happening of the event. This is similar to *Hoig v. Adrian College*, referred to above.⁵⁶ Such a situation is like the cases just discussed in that on the part of the grantor the conveyance is a pure donation, it is like the escrow cases in that something is to be done by the grantee before the conveyance is to be effective. What would be B's situation here if A, before the performance of the condition were to attempt to recall the deed? Since by the terms of the deposit with X no control or right to recall was reserved by A, the only basis on which he should be allowed to re-take the deed would be that in view of all the circumstances it could be said that X held as A's representative, as his agent. In view of the apparent disinclination on the part of some courts to render assistance in completing a pure donation it would not be surprising if X were to be looked upon as holding for A, that a *locus penitentiae* remained until final delivery. Courts in such situation would also be very ready to consider that the act to be performed by B should be done to the satisfaction of A, thus affording a basis for treating the deed in the hands of X as still subject to A's control. The court so treated the arrangement in *Hoig v. Adrian College*. Although such case need not necessarily be deemed to fall within the class of cases stated above as CASE II, there are, no doubt, considerations which would tend to cause a court to treat it as governed by the same principles.⁵⁷

⁵⁵ The situation of intervening third parties claiming through the grantor would seem to be essentially the same as in the cases of true escrows. If the deed has been delivered, that is, wholly without the grantor's control, he of course cannot call off the transaction directly by countermanding the instructions to the custodian. It surely should not be any more within his power to call it off in whole or in part indirectly by marrying, or making a will, or incurring debts, or giving the land to another. If the third party is to be in position to claim right's superior to the grantee he must be more than a mere successor to the position of the grantor. If the wife, or creditor, or grantee of such grantor can be said to be an innocent purchaser for value, then there is some basis for declaring the earlier deed as to them ineffective.

⁵⁶ So in *Bosea v. Lent*, *supra*.

⁵⁷ Cf. *Brown v. Allbright*, 110 Ark. 394.

Having seen the answer that should be given to the inquiry as to whether an enforceable contract is essential to a binding, effective escrow, it remains to answer the other question, whether any contract at all is necessary. Perhaps sufficient has already been said to

(1) Where a deed is placed with a third party, completely out indicate what is believed should be the reply.

of the grantor's control, to be delivered to the grantee upon the happening of a certain event, as the death of the grantor, no contract at all is necessary. All courts agree as to this. And it is not a sufficient explanation to say, as said by the Wisconsin court, that the contract is unnecessary because the deed is completely operative as a present conveyance. That upon such delivery to the custodian the deed is as to the grantor a completed legal act is quite true, but that it is then operative to invest the grantee with ownership is, it is submitted, not true.

(2) Where the event upon which the deed is to be operative as a conveyance depends upon some act of the grantee but not in the nature of a *return* for the conveyance, there is no reason why the result should differ from that just indicated.

(3) If something is to be done by the grantee in the way of providing a consideration for the conveyance and there has been no understanding arrived at, it is pretty difficult to avoid treating the deed as a mere offer, and the custodian as holding it as the grantor's representative. Proof of a contract should negative the idea of a mere offer or an agency. But a mutual understanding not amounting to a contract should have the same result. And although a case not likely to arise, might not the terms of deposit agreed upon between the grantor and custodian be so definite and explicit that even in the absence of such an understanding a court could not but conclude that the grantor had completely divested himself of all control over the operation of the deed? that the custodian was not holding the deed as the grantor's representative?

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